Nos. 93-1612, 93-1613

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

NATIONSBANK OF NORTH CAROLINA, N.A. and
NATIONSBANC SECURITIES, INC.,
*Petitioners,*

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF CONFERENCE OF STATE BANK SUPERVISORS, COMMUNITY BANKERS ASSOCIATION OF NEW YORK STATE, FLORIDA BANKERS ASSOCIATION, INDEPENDENT BANKERS ASSOCIATION OF AMERICA, INDEPENDENT BANKERS ASSOCIATION OF TEXAS, KENTUCKY BANKERS ASSOCIATION, MISSISSIPPI BANKERS ASSOCIATION, SAVINGS & COMMUNITY BANKERS OF AMERICA, TEXAS BANKERS ASSOCIATION, and WESTERN INDEPENDENT BANKERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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Discharging his statutory authority to administer the federal banking laws, the Comptroller of the Currency ruled that petitioner NationsBank may sell annuities

through its subsidiary. Respondent VALIC, a competing annuities distributor, challenged the Comptroller's determination. The district court properly deferred to and upheld the Comptroller's ruling. *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991); reprinted at App. 29a.[1] According no deference to the Comptroller's reasoned interpretation of the National Bank Act, the Court of Appeals for the Fifth Circuit thereafter reversed, ruling that 12 U.S.C. § 92 (Supp. V 1993)—which expressly authorizes banks located in small towns to "act as the agent for any fire, life, or other insurance company"—impliedly precludes national banks located outside small towns from selling annuities, notwithstanding any authorization that national banks might have to do so under 12 U.S.C. § 24 Seventh (1988 & Supp. V 1993). App. 1a. In the absence of an express statutory prohibition on the sale of annuities by national banks, the appellate panel improperly undertook a de novo review of the law and its sparse legislative history and reversed the district court judgment. Four judges strenuously dissented from the court's subsequent refusal to rehear the case *en banc*, stating that the panel had improperly substituted its own view of the Act for the Comptroller's and moreover had "badly erred" in its interpretation of the statutes. App. 20a, 22a.

This case involves the interpretation of a statute—the National Bank Act (the "Act")—that is more than 130 years old, together with an early twentieth century

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[1] The petitioners in these consolidated cases are NationsBank of North Carolina, N.A. and NationsBanc Securities, Inc., hereafter collectively referred to as NationsBank, and the United States and the Comptroller of the Currency. Citations to the appendices to the petition of NationsBank in No. 93-1612 are denoted by "App." No joint appendix has been filed in this case.

Pursuant to Supreme Court Rule 37.3, *amici* have requested and received consent to file this brief from counsel for petitioners and from counsel for respondent Variable Annuity Life Insurance Co. The original letters of consent to the filing of this brief have been filed with the Clerk of this Court.

amendment, and their application to contemporary financial products. The court of appeals refused to recognize that Congress has provided a flexible scheme that allows the business of banking to evolve to meet the changing needs of the marketplace. Fixing instead upon a single provision of the Act that grants *additional* powers to certain banks (*i.e.*, those that are located in communities with populations less than 5000), 12 U.S.C. § 92, the court of appeals would impose restrictions that are not expressed in the Act on all national banks in all other locations. The court of appeals accorded no deference to the Comptroller's expert analyses under Sections 24 Seventh and 92, ignoring the design and objectives of the Act as well as the fundamental role of the Comptroller in administering the Act.

*Amici* support the petitioners in urging this Court to reverse the judgment below.

## INTEREST OF THE *AMICI CURIAE*

*Amici* include the national association of state banking regulators—the Conference of State Bank Supervisors —and national, regional, and state trade associations for the financial services industry representing financial institutions of all sizes and types. The member institutions of *amici* associations are located in every state and the District of Columbia, and in major financial centers as well as in small communities and rural areas.

The *Conference of State Bank Supervisors* (CSBS) is the professional association of state government officials responsible for chartering and regulating more than 8000 state-chartered banking institutions in the fifty states and in Guam, Puerto Rico, and the Virgin Islands. CSBS joins this brief out of specific concern about the important policy consequences of the court of appeals' decision. In particular, the court of appeals' decision would have an indirect effect on the financial strength and competi-

tiveness of state-chartered banks, because many such banks operate under state laws (so-called wild card statutes) that grant state banks the same powers as are held by national banks. The court of appeals' decision in this respect affects the supervisory authority of bank regulators over state-chartered banks.

The remaining *amici* are associations representing many financial institutions that sell annuities. These *amici* and their members are directly and adversely affected by the court of appeals' decision. If allowed to stand, the decision will have an immediate and destructive effect upon the substantial busines of bank sales of annuities. Some institutions represented by *amici* have been marketing annuities for nearly a decade, in accordance with long-standing decisions of the Comptroller. *See, e.g.*, OCC, Interpretive Letter No. 331 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (1985). *Amici* include the following national and state associations whose members have an interest in the outcome of this case:

The *Community Bankers Association of New York State* is the principal trade association for savings institutions in New York. Its 129 members represent $126 billion in assets and include federal and state-chartered savings banks and savings and loan associations, and mutual and stock-owned savings and banking institutions.

The *Florida Bankers Association* (FBA) is the principal organization representing commercial banks in Florida. FBA's 321 members comprise 88% of the banks in the state, and these member banks hold 96% of the state's bank deposits.

The *Independent Bankers Association of America* (IBAA) is the only national trade association that exclusively represents the interests of the nation's community banks. The 5800 member institutions of IBAA serve a variety of communities—cities, suburbs, and rural areas —in all fifty states and the District of Columbia.

The *Independent Bankers Association of Texas* (IBAT) is a trade association representing approximately 800 independently owned or community banks domiciled in the State of Texas. The IBAT membership includes both national and state-chartered institutions.

The *Kentucky Bankers Association* is a trade association of 300 national and state banks representing over 95% of the banking industry in Kentucky.

The *Mississippi Bankers Association* (MBA) (formally known as the Mississippi Association of Financial Institutions of Deposit, Inc.) is a trade association representing commercial banks in Mississippi. MBA comprises 114 commercial banks, which hold over 99% of the state's commercial banking assets.

*Savings & Community Bankers of America* is the national trade organization for the savings industry. Its 1900 members include federal and state-chartered instituitons, stockholder or mutually-owned, throughout the United States.

The *Texas Bankers Association* (TBA) is the principal trade association for the commercial banking industry in Texas. TBA's members include over 900 federal and state-chartered banks within the state. The members include banks of all sizes located throughout Texas, including independent banks as well as members of multistate holding companies. TBA members account for approximately 95% of the deposits in Texas' commercial banking system.

*Western Independent Bankers* (WIB) is the only regional multistate banking association in the United States. Its members consist of 250 independent community banks located in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Utah and Wyoming, as well as American Samoa and Guam. WIB's members account for more than $34 billion in banking assets.

## SUMMARY OF THE ARGUMENT

At issue in this case is the ability of national banks to market annuities as selling agents of other, third-party issuers. Because banks act as intermediaries in the issuance of annuity contracts, such annuity sales by national banks pose no risk to the financial safety and soundness of the banks themselves. At the same time, bank annuity sales benefit the public, which understandably expects banks to offer a wide range of financial products and services. Sales of investment products, including mutual funds and annuities, provide banks with an important and growing source of revenue.

The Comptroller—who is charged with the responsibility to ensure the soundness of national banks—correctly determined that fixed and variable annuities are financial investment products that fall within the business of banking, and that the sale of such products by national banks accordingly is authorized under 12 U.S.C. § 24 Seventh. The court of appeals erred both in refusing to recognize the congressionally-designed flexibility of national banks to sell innovative financial products, and in failing to accord appropriate deference to the Comptroller's reasonable interpretation of the Act.

The Comptroller also properly determined that annuities are not "insurance" within the meaning of 12 U.S.C. § 92 and that Section 92 does not impliedly limit bank sales of annuities. Variable and fixed annuities are recognized by the great weight of authority to be investments, and thus are appropriate elements of the business of banking regardless of whether certain types of annuities bear some "insurance" or risk-shifting characteristics. The court of appeals improperly failed to accord any deference to the Comptroller's determination that annuities are not "insurance" within the meaning of Section 92.

The court of appeals also erred in reading Section 92 as an implied limitation on the authority of national banks to sell annuities as a financial product within the

parameters of the business of banking. Section 92 does not by its terms limit bank sales of annuities or insurance, nor does the affirmative authorization in Section 92 for banks located in small towns to act as general *insurance* agents in the sale of a wide range of insurance policies negate other banks' ability to market specific types of *investment* products such as the annuities at issue in this case. Congress did not attempt in Section 92 to define fully the powers of national banks to engage in the sale of all types of insurance-related products.

## ARGUMENT

Section 24 Seventh was reasonably interpreted by the Comptroller to authorize NationsBank to sell annuities because that activity is within banks' power to broker financial investment instruments. App. 37a-41a.[2] Section 24 Seventh does not enumerate the specific types of financial products and services that national banks may market. Instead the statute provides substantial flexibility to allow for the development of financial products to meet the changing needs and expectations of consumers. Moreover, Section 92 was reasonably found by the Comptroller not to limit the authority of national banks to market specific types of investment products such as annuities, regardless of whether such products are deemed to be "insurance" for purposes of that law.

### I. SECTION 24 SEVENTH AUTHORIZES NATIONAL BANKS TO SELL ANNUITIES AS PART OF AND INCIDENTAL TO THE BUSINESS OF BANKING.

Banks have played a historic role in our national commerce as financial intermediaries. In furtherance of this role, banks have long offered annuity contracts as part of

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[2] The Comptroller also noted that to the extent the annuity contracts at issue in this case might be considered "securities" under the Glass-Steagall Act, they would fall within national banks' express securities brokerage authority, which appears elsewhere in Section 24 Seventh. App. 37a.

the diverse menu of financial investments made available to bank customers.

The Comptroller's ruling allowing the sale of both fixed and variable annuities by national banks is pro-competitive. In particular, consumers find in banks a convenient and ready provider of these types of financial products. As the Comptroller noted in his opinion: "Customers will benefit from the increased range of products made available to them by [petitioner NationsBank]." App. 48a. Bank customers are the primary beneficiaries of bank annuity sales because the distribution of annuities by and through banks provides a convenient and competitive means for consumers to purchase such investment products. Indeed, between 75% and 90% of those purchasing annuities from banks in 1993 were first-time buyers of these products. Association of Banks-In-Insurance, *Fact Book* 7 (1993). Annuity issuers also benefit from banks' ability to serve as a popular "retail" outlet for their annuity products. The court of appeals' attempted revocation of banks' ability to sell annuities would leave consumers with little choice but to purchase annuities through fewer and less conveniently available sources, such as insurance agents and other non-bank distributors like respondent VALIC. In short, by foreclosing bank annuity sales and thus constricting the consumer's opportunity to purchase annuities, the decision below would make the public the victim of its error.

Banks' ability to market annuities and similar investment products also benefits the banking system. Fees generated by bank brokerage of annuities represent an increasingly important source of revenue for banks. Banks' financial positions are strengthened by these fees. Recent statistics provided by Kenneth Kehrer and Associates demonstrate that financial institutions more than tripled their annual annuity sales between 1987 and 1993. By 1993 annual annuity sales by financial institutions in the United States totalled *$13.5 billion*. In 1993 banks and thrifts accounted for 21.3% of individual annuity sales.

At the same time, the sale of annuities by banks poses no risk to the financial security of banks, for at issue here is solely their ability to act as agents for non-bank issuers of the annuity contracts. For the same reason, such bank sales of annuities pose no risk to the federal deposit insurance funds.

### A. The Sale of Annuities Is Part of and Incidental to the Business of Banking.

Under the Act, Congress empowered national banks to engage in the business of banking. In Section 24 Congress set forth the basic elements of national bank powers. Congress did not in that Section or elsewhere exhaustively delineate the parameters of banking functions, nor does the Act enumerate all the financial products and services that national banks may offer their customers. Rather, Congress in Section 24 Seventh imbued national banks with "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh.

Consistent with their charter to carry out the business of banking and pursuant to the "incidental powers" clause of Section 24 Seventh, national banks traditionally have provided a wide and increasingly diverse range of financial products and services to the public. Annuities are within the scope of the types of financial services that national banks have long provided to their customers. Annuities, like such other familiar investment products as certificates of deposit and mutul funds, offer consumers a convenient way to obtain a return on their assets and to augment their savings. The tax-deferred feature of annuities, similar to individual retirement accounts (IRAs), makes annuities particularly appealing as investments for retirement. The Comptroller recognized this function of annuities: "Most commonly, annuities are marketed as a tax-sheltered means of saving for retirement." App. 38a. Annuities are widely recognized as essentially investment products, and the Comptroller's reasoned determination

that annuities are financial investment products, within the power of national banks to market is reasonably founded both in the law and the perceptions of the marketplace. *E.g., New York State Ass'n of Life Underwriters v. New York State Banking Dep't*, 598 N.Y.S.2d 824, 828 (App. Div. 1993) (upholding power of New York-chartered banks to market annuities: "[T]he great weight of authority in this country views an annuity as an investment and not a contract of insurance."), *aff'd*, 83 N.Y.2d 353 (1994) ("*Life Underwriters*"). "Annuity contracts must . . . be recognized as investments, rather than insurance." 1 John A. Appleman, *Insurance Law and Practice* § 84, at 295 & n.3 (1981) (collecting cases).[3]

While Section 24 Seventh does not expressly mention "annuities"—just as it does not mention IRAs or, for example, certificates of deposit—the investment characteristics of annuities make them financial investment products that fit comfortably within the contemporary business of banking. "[T]he National Bank Act did not freeze the practices of national banks in their nineteenth century forms." *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). Rather, "the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *Id.* Indeed, as this Court has instructed in interpreting the statutory powers of national banks, "[w]e do not think the . . . Act should be construed to freeze individual banks . . . to the customs and practices preceding the statute." *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377 (1954) (holding that national banks may use the term "savings" in advertising the availability of deposit accounts).[4]

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[3] *See also* Ellen E. Schultz, *Variable Annuities Provide the Choices of Mutual Funds, Plus Some Tax Breaks*, Wall St. J., Oct. 14, 1993, at C1 (describing variable annuities as investment contracts).

[4] The provision at issue in that case—enacted as part of the Federal Reserve Act and previously codified at 12 U.S.C. § 371

Judicial interpretations of Section 24 Seventh's specific state law predecessor reinforce the intent of the federal incidental powers clause to provide for the full participation of banks in the evolving business of banking. Section 18 of the New York Free Banking Act of 1838 (now codified in relevant part at N.Y. Banking Law § 96(1) (McKinney 1993)) ("Section 96(1)"), which contains language identical to that of Section 24 Seventh, is acknowledged to be the progenitor of the incidental powers clause of Section 24 Seventh. Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 698-99 (1983).[5] The principal drafter of the legislation that would become the Act, Representative Elbridge G. Spaulding, was a New York lawyer and banker. John J. Knox, *A History of Banking in the United States* 221, 294 (1901). He was undoubtedly well aware of the purpose of New York's incidental powers clause when he included identical language in the federal statute. Indeed, in his remarks to the House of Representatives, Representative Spaulding stated that "the [federal] bill in all its essential features is like the free banking law of the State of New York." Symons, *supra*, at 699. Hence, Section 96(1) is instructive as to the meaning of—and the congressional intent underlying—the federal provision.[6]

New York courts, in holding that the sale of annuities by banks is permissible under Section 96(1), have recognized that "the 'incidental powers' clause has as its purpose events in futuro." *Life Underwriters*, 598 N.Y.S.2d at 827, 829 (App. Div. 1993), *aff'd*, 83 N.Y.2d 353 (1994). The New York Court of Appeals affirmed the

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(1952)—dealt with the authority of national banks to accept and pay interest on time and savings deposits. 347 U.S. at 375-76.

[5] *See* Bray Hammond, *Banks and Politics in America From the Revolution to the Civil War* 727 (1957); John J. Knox, *A History of Banking in the United States* 221-22 (1901).

[6] *See* 2B Norman J. Singer, *Sutherland Statutes and Statutory Construction* §§ 51.01, 51.06 (5th ed. 1992) (state and federal statutes *in pari materia* are to be construed together).

appellate division's decision in *Life Underwriters* earlier this year and emphasized that "the business of banking is not static but rather must adjust to meet the needs of the customers to whom banking organizations provide a valuable service." 83 N.Y.2d at 361.

This interpretation of New York's incidental powers clause is of long standing. The decisions in *Life Underwriters* were based on *Curtis v. Leavitt*, 15 N.Y. 9 (1857), handed down seven years before Congress enacted the National Bank Act. In *Curtis*, the New York Court of Appeals held that banks may borrow money—though not expressly empowered to do so by statute—as a power incidental to the business of banking. *Id.* at 54-59.

In *Dyer v. Broadway Central Bank*, 252 N.Y. 430 (1930), the New York Court of Appeals reaffirmed the essential flexibility of the state's incidental powers clause. The court there recognized that "[b]anks *ex necessitate* have been required to extend their functions and perform services formerly foreign to the banking business." *Id.* at 433. Indeed, the court in *Dyer* cautioned that "care should be exercised not to cripple [banks] and break down their usefulness by a narrow and unreasonable construction of the [banking] statutes which will result in unwisely limiting their usefulness in the transaction of business under modern conditions." *Id.* at 434.

Like its New York counterpart, the incidental powers provision of Section 24 Seventh does not "freeze" the business of banking in time. *M & M Leasing Corp.*, 563 F.2d at 1382. Rather the incidental powers clause should, like its New York predecessor, "be construed as an independent, express grant of power, intended to reflect the ever-changing demands of the banking business." *Life Underwriters*, 83 N.Y.2d at 363. The proper inquiry under Section 24 Seventh is not whether the sale of annuities was incidental to the business of banking 130 or even 80 years ago, but whether the sale of such products is incidental to the banking business today.

The court of appeals, however, overturned the reasoned conclusion of the Comptroller that national bank sales of annuities are part of the business of banking and are authorized by the Act. The holding of the court of appeals fundamentally misconstrues the well-established function of the incidental powers clause and unduly constrains the flexible statutory scheme crafted by Congress to govern national banks. The court of appeals wrongly looked to the embryonic business of banking as it then existed in 1864 (when the Act was enacted) and in 1916 (when Section 92 was added to the Act) to determine whether the sale of annuities is incident to that business today. App. 17a. This retrospective analysis ignores the purpose of Section 24 Seventh—to allow the business of banking to evolve to meet changing market and consumer demands.[7]

Rather than address the well-established purpose of the incidental powers clause or its import to national bank sales of annuities, the court of appeals stated summarily that "[e]ven conceding arguendo that the power to sell annuities would be one incidental to banking, by no stretch of the imagination can that power be deemed '*necessary*.'" App. 15a (emphasis added). Thus, in addition to ignoring the flexibility of the incidental powers clause, the court of appeals also erroneously relied upon an overly restrictive and judicially discredited test in reviewing the bank's activities. Federal courts consistently have rejected this restrictive construction of the incidental powers clause for at least two decades.[8] Instead, the

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[7] The court of appeals repeated the error it had made in *Saxon v. Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968). There the court of appeals similarly looked to the business of banking as it existed in 1916 to determine whether a national bank could operate an insurance agency under the incidental powers clause of Section 24 Seventh.

[8] As noted above, the New York state courts have rejected this crabbed interpretation of the incidental powers clause for over a century: "It is plain that [banking] corporations, in executing their express powers, are not confined to means of such indispensa-

courts generally construe an activity to be a permissible form of the business of banking under Section 24 Seventh if the activity is "*convenient or useful* in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972) (emphasis added); *accord M & M Leasing Corp.*, 563 F.2d at 1382; *Securities Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1049 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *First Nat'l Bank of E. Ark. v. Taylor*, 907 F.2d 775, 778 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990). *Cf. American Ins. Ass'n v Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (finding even the "convenient and useful" test of *Arnold Tours* to be unduly restrictive).

### B. The Court of Appeals Should Have Deferred to the Comptroller's Expert Determination on National Bank Authority to Sell Annuities.

The Comptroller's determination that national banks are authorized to sell annuities is consistent with his responsibility to administer the Act so as to ensure the safety and soundness of banks. Congress created the Office of the Comptroller of the Currency to oversee national banks and administer the national banking laws. For over a century the Comptroller has been expert in this complex area of law, regulation, and business:

> [C]ourts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

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ble necessity that without them there could be no execution at all." *Curtis*, 15 N.Y. at 64-65.

*Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987) ("*Clarke v. SIA*") (quoting *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626-27 (1971)); *see also* 12 U.S.C. §§ 26 (1988) (Comptroller's chartering authority), 211(a) (1988 & Supp. V 1993) (rulemaking authority), 1818 (1988 & Supp. V 1993) (enforcement authority). The financial services industry is complex, ever-changing, and heavily regulated. *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980). This regulatory and competitive environment is particularly suited to the expert judgment of the regulators that deal with the industry on a day-to-day basis.

While Congress allowed for the activities of national banks to evolve over time, that evolution was made subject to the supervision of the Comptroller. Congress empowered the Comptroller to ensure the orderly development of the national banking system consistent with safe and sound banking standards. It is this regulatory authority that has allowed the business of banking to evolve and meet the challenges of the ever-changing financial services market, though the structure of the Act has remained essentially unchanged for well over a century.

Whether the sale of annuities is an "incidental power" under Section 24 Seventh is in the first instance for the Comptroller to determine. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984); *Clarke v. SIA*, 479 U.S. at 403-04; *Investment Co. Inst. v. Conover*, 790 F.2d 925, 931-32 (D.C. Cir.) (upholding decision of Comptroller authorizing national bank to establish and market a collective investment trust for assets of IRAs), *cert. denied*, 479 U.S. 939 (1986). His determination should control so long as it represents a reasonable construction of the Act. Ignoring this fundamental principle of administrative law, the panel instead rendered its own interpretation, compounding its error by looking backward in time instead of forward. By substituting its own construction of the stat-

ute for that of the Comptroller, the court of appeals ignored the regulatory scheme established by Congress, in derogation of the instructions of this Court in *Chevron* and *Clarke v. SIA*, and improperly constructed anticompetitive barriers that prevent banks from participating fully in the rapidly changing financial services marketplace.

## II. SECTION 92 DOES NOT IMPLIEDLY LIMIT NATIONAL BANKS' AUTHORITY TO MARKET ANNUITIES.

The court of appeals did not—and could not—rely upon any express statutory restriction on bank sales of annuities because none is to be found. Instead the court of appeals engaged in an indirect, two-step inquiry: The panel first determined that Section 92 impliedly precludes banks located outside small towns from selling insurance because Section 92 affirmatively authorizes banks in small towns to act as insurance agents. The court of appeals then found that annuities are insurance. This analysis begged the fundamental question in this case—whether the federal banking laws, particularly Section 92, evidence a congressional intent to preclude national bank sales of annuities.

When he examined the issue, the Comptroller correctly found that Section 92 does not expressly or impliedly limit the authority of national banks to market annuities and that in any event, annuities are not insurance within the meaning of Section 92. The Comptroller's reasoned determination should be upheld, and the contrary ruling of the court of appeals should be reversed.

### A. Section 92 Has No Bearing on National Bank Annuity Sales Because Annuities Are Not "Insurance" Within the Meaning of That Section.

Section 92 addresses only the solicitation and sale of *insurance* policies, and therefore sheds no light on whether national banks may market *annuities*. Both as

a matter of congressional intent and from a contemporary perspective, the full range of annuities at issue in this case are not "insurance" within the meaning of Section 92. Accordingly, Section 92 is not pertinent to the case at hand.

As an initial matter, the court of appeals erroneously relied on its prior decision interpreting Section 92, *Saxon v. Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968). *Saxon* was an "insurance" case that entailed no question as to the status of the product under the Act. There, the bank had received approval to sell "broad forms of automobile, home, casualty and liability insurance" as agent for insurance companies. *Id.* at 1012. The *Saxon* court read Section 92 impliedly to limit the scope of national bank authority, invoking the interpretive maxim, *expressio unius est exclusio alterius*. *See* App. 6a. Considering that "Congress dealt specifically with the insurance agency power in Section 92," the *Saxon* court found that "the *expressio unius* rule negates the existence of any other power to act as an insurance agent under the general provisions of Section 24(7)." 399 F.2d at 1014. Here, what is at issue is the sale of annuities issued by third parties by national banks, and the decision in *Saxon* regarding broad insurance powers is inapposite. Other courts have similarly distinguished *Saxon* in cases involving particular bank products or services. *See Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979) (authorizing national bank sales of credit life insurance, and distinguishing *Saxon* as involving "banks' authority to sell broad forms of automobile, home, casualty and liability insurance"), *cert. denied*, 449 U.S. 823 (1980).

Because this case involves only the sale of annuities, the *expressio unius* rationale embraced by *Saxon* has no utility here: it is a non sequitur to argue that Section 92's enabling provisions as to "insurance agency powers," 399 F.2d at 1014, foreclose national banks from selling annuities. The conclusions the *Saxon* court gleaned from

Section 92 about national banks' insurance agency power to sell "insurance . . . policies," 12 U.S.C. § 92, shed no light on such banks' incidental power to market annuities and other subsequently developed products about which Section 92 is necessarily silent. In short, even were the *Saxon* exegesis sound, Congress' decision in 1916 to grant power to banks located in small communities to "solicit[] and sell[] insurance . . . policies," 12 U.S.C. § 92, evinces no intent to circumscribe national banks' authority to market other products, whether they be annuities, IRAs, money market funds, or yet-to-emerge investment arrangements.

Neither the text nor the purpose of Section 92 supports the court of appeals' conclusion that Congress intended by Section 92 to limit annuity sales by national banks on a geographic basis. As to text, a plain reading of the provision gives rise to a fair inference that Congress did not intend to address annuity sales at all, since Congress did not use the word "annuities." Equally as plausible as the court of appeals' conclusion that Section 92 impliedly restricts national bank sales of annuities, then, is the conclusion that Congress did not speak to annuities at all in that provision.

Nor does Section 92 exhibit any public policy basis on which Congress would restrict national bank sales of annuities. By blindly applying the *expressio unius* rule, the court of appeals could draw only one conclusion as to Section 92's purpose: that by granting to national banks in small towns the authority to act as general insurance agents Congress intended to preclude banks in other locals from doing so. But the court retreated from any attempt to explain why Congress would have intended this conclusion.[9] Further, the court offered no ex-

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[9] Searching for a rationale to support its conclusion, the court cited only the sparse legislative history of Section 92—a letter by then-Comptroller Williams to the Chairman of the Senate Banking and Currency Committee. App. 7a-8a. In the Comptroller's view,

planation why Congress, even if its intent in Section 92 were to limit national banks from acting as insurance agents in the sale of broad forms of insurance, would have also intended to restrict national bank sales of annuities. In short, the court of appeals went far beyond the text and design of the statute when it purported to divine in Section 92 a congressional intent to foreclose national banks from selling annuities. Congress simply did not speak to that issue in Section 92.

The court of appeals cited no evidence that when Congress enacted Section 92 in 1916 it deemed the annuities at issue in this case to be a type of "insurance . . . polic[y]." [10] Particularly with respect to variable annuities, Section 92's references to "insurance compan[ies]" and "insurance . . . policies" cannot be read to encompass the financial products at issue in this case. Variable annuities were not originally the domain of insurance companies, having first been introduced in the early 1950s by a non-insurance organization, the College Retirement Equities Fund. Not until the late 1950s did insurance companies begin to imitate this product in an effort to counter the declining popularity of traditional insurance

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Section 92 was desirable because, in small towns, the amount of insurance policies written would not be sufficient to "take up the entire time of an insurance broker." App. 8a. Public policy *supported* bank sales of insurance, then, to fill a void (servicing customers in small towns) that insurance agents might not fill.

The Comptroller's only rationale for distinguishing between banks located in small towns and those located elsewhere is that because small towns might not be serviced by independent insurance agents, banks there would "not [be] likely to transgress upon outside business naturally belonging to others." *Id.* The court of appeals embraced this anticompetitive rationale without hesitation. Such an anticompetitive intent, however, should not so readily be attributed to Congress. *Cf. Independent Ins. Agents v. Ludwig*, 997 F.2d 958, 961 (D.C. Cir. 1993) ("[W]e cannot assume that Mr. Williams' letter was read, much less relied upon, by the majorities in Congress who enacted section 92.").

[10] The federal banking laws do not define "insurance." As of 1916 the term "annuity" did not appear in the federal banking laws.

products. Note, *Redefining Insurance: Distinguishing Between Life Insurance and Investment Under Volatile Inflation*, 91 Yale L.J. 1659, 1664-65 (1982) (citing Joseph W. Bartlett, *Variable Annuities: Evolution and Analysis*, 19 Stan. L. Rev. 150, 150-52 (1966)); *see SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 & n.9 (1959) ("*SEC v. VALIC*"). Indeed, a wide range of annuity products exists today, some not involving mortality risks or actuarial calculations. *See* App. 27a (Smith, J., dissenting from denial of rehearing en banc). The court of appeals' conclusion that Section 92 prohibits national banks from marketing any annuities is not supported by the text or purpose of that provision.

By authorizing banks in small towns to sell "insurance" policies, Section 92 does not forbid banks elsewhere from selling annuities because annuities are not "insurance." "Ordinarily, it is recognized, even by laymen, that contracts of life insurance and of annuity are distinctly different." 1 John A. Appleman, *Insurance Law and Practice* § 84, at 295 (1981); *see* App. 24a-25a (Smith, J., dissenting from denial of rehearing en banc) (citing authorities).[11] This Court has squarely so held. *SEC v. VALIC*, 359 U.S. at 65. There VALIC, the respondent in this case, argued that a variable annuity product was an "insurance" contract and therefore was exempt from securities registration requirements. This Court disagreed, emphasizing that the "concept of 'insurance' involves some investment risk-taking on the part of the company." *Id.* at 71. Finding that variable annuities placed the investment risk on the policy holder, not the issuing com-

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[11] The court of appeals relied substantially on state laws that characterize annuities as insurance. App. 11a & n.2. In doing so, the court ignored its own ruling that recognized annuities are not always treated as contracts of insurance under state law. In *In re Newman*, 993 F.2d 90 (5th Cir. 1993), the court of appeals held that annuities are "general intangibles" under the Texas Uniform Commercial Code ("UCC"). Significantly, the UCC expressly excludes insurance contracts from the category of "general intangibles." *Id.* at 93-95.

pany, the Court ruled that variable annuities are not "insurance" exempt from the Securities Act of 1933 and Section 2(b) of the McCarran-Ferguson Act. *Id.* at 66-73. Concurring, Justice Brennan found that while the contracts contained "insurance features," they nonetheless to a substantial degree contained elements of investment contracts and thus did not constitute "insurance." *Id.* at 91.

This Court reaffirmed the vitality of *SEC v. VALIC* only last December. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993). In analyzing whether the contract at issue in *John Hancock* was a "guaranteed benefit policy" exempt from certain aspects of the Employee Retirement Income Security Act, the Court looked to its "decisions construing the insurance policy exemption [of] the Securities Act of 1933." *Id.* at 527. In conducting this analysis the Court examined each component of the contract to determine whether that component allocated risk to the insurer.

While not directly addressed by the decisions in *SEC v. VALIC* or *John Hancock*, fixed annuities also are not appropriately deemed to be "insurance" for purposes of Section 92. As the Comptroller noted, fixed annuities "are primarily financial investments" because their purchasers "are not seeking to pool a catastrophic risk such as death, injury, or property damage, but are instead seeking a guaranteed, long-term return on their assets." App. 38a. Also, there is a "close functional resemblance between fixed annuity contracts and other financial investment instruments that banks may sell as agent." App. 39a.

*SEC v. VALIC* and *John Hancock* provide persuasive support for the Comptroller's determination that annuities are not "insurance" for purposes of Section 92, in that neither fixed nor variable annuities bear the underwriting risk hallmark of an insurance product. Beyond that, however, the proper focus for purposes of the federal

banking laws, and in reviewing the Comptroller's determinations, is whether the particular activity at issue (here the sale of annuities) bears a reasonable relationship to the business of banking, not whether the product happens to evidence some insurance characteristics. That a product may have some insurance or risk-shifting attributes does not disqualify it from the business of banking, for there is no evidence that in enacting Section 92 Congress drew any distinction between products that shift the risk of loss from the policy holder to the policy issuer and products that lack such a feature—a distinction this Court found important in interpreting federal securities laws.[12] At issue in this case is the authority of national banks to act as intermediary between the policy holder and policy issuer in the sale of a product with investment characteristics. The locus of the risk has little bearing on that issue; indeed, selling banks bear no such risk. Bank facilitation of annuity sales is consistent with banks' mission as financial services providers and with the sound business of banking.

The Comptroller found that annuities are not "insurance" within the meaning of Section 92. The court of appeals did not even discuss whether deference to that determination was warranted. Under the court of appeals' "no-deference" standard, the judiciary would bear the de novo responsibility for classifying each new financial in-

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[12] *Cf. SEC v. VALIC*, 359 U.S. at 80 (Brennan, J., concurring): "Much bewilderment could be engendered by this case if the issue were whether the contracts in question were 'really' insurance or 'really' securities—one or the other. It is rather meaningless to view the problem as one of pigeonholing these contracts in one category or the other."

For purposes of federal banking laws, a financial product that bears investment characteristics should be presumed to fall within the business of banking, even if the product also contains insurance characteristics. In this way, Section 92, even if read as a limitation on bank insurance powers, can be reconciled with Section 24 Seventh's authorization for national banks to carry out the business of banking.

novation as "insurance" or "investment." Congress has provided a judicially more economical and competitively better way—deferring to the expert judgment of the Comptroller as the primary interpreter of what constitutes the business of banking.[13]

The statutory scheme does not give unrestricted power to the banks. The Comptroller retains authority to limit any activity that deviates from the authorization the Comptroller has given NationsBank. While this case does not pose the question, the Comptroller can approve (or disapprove) and thereafter regulate national banks sales of financial products and services, including insurance, that are determined by him to be incidental to the business of banking. The Comptroller may deny a request by a national bank to engage in such activity, or may take enforcement action against an entity that does so. 12 U.S.C. § 1818 (1988 & Supp. V 1993). In short, the Comptroller retains pervasive authority to make particularized determinations to guard against compromise of the letter or design of the federal banking laws. *See Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst.*, 450 U.S. 46, 57 (1981) (finding deference to Board particularly appropriate where procedures ensured that Board would have "opportunity to ensure that no bank holding company exceeds the bounds of a bank's traditional fiduciary function of managing customers' accounts").

**B. Section 92 Does Not Limit the Business of Banking.**

The premise of the court of appeals below and in its prior decision in *Saxon* was that Section 92 poses a "spe-

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[13] If it were Congress' intent that national banks not market annuities, Congress presumably would have said so by now. The Comptroller first expressly authorized national banks to market some forms of annuities a decade ago. *See, e.g.*, OCC, Interpretive Letter No. 331 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (1985). In the intervening years Congress has not enacted legislation depriving the Comptroller of the authority to permit national bank sales of annuities.

cific limitation," App. 3a; *see* App. 15a-16a, on the power of national banks in places with more than 5000 residents to sell insurance policies, and that this limitation supersedes any previous congressionally fashioned grant of general authority for national banks to engage in the business of banking under Section 24 Seventh. This premise and the court's conclusion that Congress in Section 92 fully defined the scope of national bank powers to market insurance-related products are incorrect.

As enacted in 1864, the Act did not limit the authority of national banks to engage in insurance activities. National Bank Act of 1864, c. 106, 13 Stat. 100; Ross M. Robertson, *The Comptroller and Bank Supervision: A Historical Appraisal* app. at 195-214 (1968). Not until 1916, more than a half century later, did Congress enact Section 92—the provision the court of appeals found dispositive of this case. Act of Sept. 7, 1916, c. 461, 39 Stat. 753. Like the original Act, Section 92 did not limit bank powers to market insurance products. Instead, Section 92 expressly grants power "[i]n addition" to the other powers of national banks.

Congress' purpose in enacting Section 92 is made plain by the provision's text: banks in small towns are authorized to act as general insurance agents by soliciting and selling a wide range of insurance policies on behalf of any state-authorized "fire, life, or other insurance company":

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company . . . by soliciting and selling insurance and collecting premiums on policies issued by such company . . . .

12 U.S.C. § 92. The court of appeals' conclusion—that Congress intended Section 92 to be the sole source of authority for and definition of all bank insurance powers —places on that provision far more significance than its words can bear. Whatever its rationale, Congress did not in Section 92 fully define the power of national banks to participate in insurance-related functions.

Beyond the fact that the explicit wording of Section 92 makes plain that Congress did not intend that provision to "occupy the field" of national bank marketing of insurance-related products, Section 92 also gives no indication that Congress impliedly attempted to restrict the general bank powers set out in Section 24 Seventh. In deciding this case, however, the court of appeals "largely follow[ed]" its prior decision in *Saxon*. App. 17a. There, the court found that Section 92 placed specific limits on banks powers, even those that may have been granted under the provisions of Section 24 Seventh. By attempting to impose a limiting intent on the powers of Section 24 Seventh, the court of appeals ignored this Court's oft-repeated admonition that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). The court of appeals erred in viewing the enabling legislation of 1916 as a provision intended forever to foreclose national banks from marketing any insurance-related financial investment products.

If Congress had intended to limit bank insurance activity, it knew how to say so. For example, Section 16 of the Glass-Steagall Act expressly amended Section 24 Seventh to limit banks' authority to deal in securities and stocks, and expressly stated that a national bank was not authorized to purchase stock for its own account. In 1971 this Court examined whether the Comptroller properly could authorize national banks to sell shares in a stock fund created and maintained by the bank. *Investment Co. Inst. v. Camp*, 401 U.S. 617, 621 (1971). The Court noted

that "§§ 16 and 21 of the Glass-Steagall Act appear clearly to prohibit this activity by national banks." *Id.* at 625. Indeed, "[t]he literal terms of that Act *clearly prevent*[*ed*] what the Comptroller ha[d] sought to authorize." *Id.* at 639 (emphasis added). But even while yielding to this clear statutory command, the Court emphasized that courts "cannot come lightly to the conclusion that the Comptroller has authorized activity that violates the banking laws." *Id.* at 626.[14]

Thus, when Congress wanted to draw a clear line defining and limiting bank functions, it knew how to do so. Just as it has defined the securities brokerage authority of national banks, Congress has authoritatively defined the trust powers of national banks. 12 U.S.C. § 92a (1988). As another example, a national bank may not deal in lottery tickets because Congress *expressly* has so stated. 12 U.S.C. § 25a(a) (1988). Section 92, in contrast, neither purports fully to define national banks' ability to market specific insurance-related products, nor expressly forbids national banks from doing so.

The Comptroller's view that Section 92 is an enabling provision and not a limiting one is further strengthened by the absence from the 1916 legislative record of evidence that national banks located outside small towns were engaged in insurance activity, that such activity was viewed as abusive, or that Section 92 was designed to stop such a practice. By contrast, Congress banned national bank dealing in lottery tickets in response to the fact that banks in New York were doing just that. S. Rep. No.

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[14] The Court was unwilling to defer to the Comptroller in the *Camp* case because the Comptroller had not issued a written position on the impact of the banking laws in promulgating the regulation at issue. 401 U.S. at 627-28. Here, by contrast, the Comptroller made a reasoned determination that the banking laws permit the activity he has authorized. *See Board of Governors*, 450 U.S. at 68 (adhering to the obligation to afford deference to Comptroller who—in contrast to the situation in *Camp*—had provided his expert opinion on the issue at hand).

727, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 2228, 2229, 2231.

The text of Section 92 tells us only that Congress thought that it should be statutorily explicit that banks located in small towns may act as general insurance agents. To read into Section 92 a negative (and anticompetitive) intent to define restrictively all national bank activities regarding insurance, let alone regarding all investment products that may have some attributes in common with insurance, is to ascribe to that provision far more than is warranted by the text. The court of appeals erred in interpreting Section 92 to be dispositive of all types of bank insurance-related sales activities.

Other courts of appeals have agreed: "There is a strong argument that *Saxon* was wrongly decided. The legislative history indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance." *Independent Ins. Agents v. Board of Governors of the Fed. Reserve Sys.*, 736 F.2d 468, 477 n.6 (8th Cir. 1984). "By its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 n.18 (D.C. Cir. 1979) (authorizing sale of credit life insurance), *cert. denied*, 449 U.S. 873 (1980). *Cf. Commissioner v. First Sec. Bank*, 405 U.S. 394, 403 n.16 (1972) ("The making of credit insurance available to customers was and is a common practice in the banking business"; noting but not ruling on *Saxon*'s reading of Section 92).

The proper approach to interpreting Section 92 is to accept that provision for what it says—not, as did the court of appeals, to draw expansive conclusions from what it leaves unsaid. Section 92 lacks the clear, express commands that would evidence congressional intent wholly to define this field. If Congress perceives abuses

in Comptroller-sanctioned activities by banks in the insurance or investment product fields, Congress easily can, as it has done elsewhere, limit the scope of that activity.[15] In this circumstance the judiciary should tread lightly, taking care to avoid leaping from a narrowly stated positive addition to general banking powers to a sweeping negation of all that is unstated, particularly where there exists *in pari materia* a provision such as the incidental powers clause. Absent "literal" legislative terms that "clearly prevent" particular bank activity, *ICI v. Camp*, 401 U.S. at 639, the court of appeals should not have overturned the studied determination of the Comptroller. The court of appeals misinterpreted Section 92, and its judgment should be reversed.

## CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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[15] *See ICI v. Camp*, 401 U.S. at 644 (Blackmun, J., dissenting): I am not convinced that the Congress, by [the Glass-Steagall] Act or otherwise, as yet has proscribed the banking endeavors under challenge here by competitors in a highly competitive field . . . . I would leave to Congress the privilege of now prohibiting such national bank activity if that is its intent and desire.